FILE COPY

FILED
APR 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1244

L. VERDELLE CLARK,

Petitioner,

vs.

LESLIE HOLMES, FRANCIS GEIGLE, JOHN SKOK, GEORGE TERWILLIGER, BRUCE VON ZELLEN, ROBERT WHITESEL, HARVEY FEYERHERM, CHARLES ROHDE and ROBERT BULLINGTON,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

ELMER GERTZ and
WAYNE B. GIAMPIETRO
120 S. LaSalle Street
Suite 1805
Chicago, Illinois 60603
Attorneys for Petitioner

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1244

L. VERDELLE CLARK,

Petitioner,

VS.

LESLIE HOLMES, FRANCIS GEIGLE, JOHN SKOK, GEORGE TERWILLIGER, BRUCE VON ZELLEN, ROBERT WHITESEL, HARVEY FEYERHERM, CHARLES ROHDE and ROBERT BULLINGTON,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Rather than replying to Petitioner's arguments in support of the Petition for Writ of Certiorari, respondents have resorted to unfounded statements that the issues presented in the Petition are not properly before this Court, as if to imply that they were not presented or considered by the Courts below. The record in this matter shows that such contentions are not well-founded.

Respondents first state that the issue concerning the removal of Petitioner from the classroom in mid-year was not raised below. This is not supported by the record. Plaintiff testified to the facts surrounding his removal from the classroom. (Tr. 93-102) The subject was also discussed in the opinion of the Court of Appeals. (See p. 3a, Petition for Certiorari.)

The contention most germaine to the issue raised herein is the extent to which teachers hold First Amendment rights insofar as their classroom conduct is concerned. Are the constitutional rights of teachers to be wholly determined by their superiors? Are teachers, not under tenure, to be subject to every whim and caprice of jealous colleagues who couch their actions in terms of professional judgments? If so, this Court's pronouncement that the classroom is the "market place of ideas" is an empty gesture.

Respondent's argument that they were only exercising their First Amendment rights is pure sophistry. Their statements were made in support of adverse action taken against Petitioner. They did not merely meet his criticisms in the same milieu in which those criticisms were made. Rather, their statements were made in support of depriving plaintiff of his opportunity to a renewal of his contract to teach, and in support of the drastic action of removing him from the classroom in mid-year. To attempt to equate their statements with those of Petitioner is sophistry.

Furthermore, the District Court and Court of Appeals did not balance the interests of the parties and find that the petitioner's rights were outweighed by other consid-

erations, but flatly held that "Instructions on the First Amendment rights of public school teachers were inapplicable to this case", and that "There was no First Amendment issue appropriate for consideration by the jury." This is tantamount to saying that once a school teacher enters the classroom he is at the mercy of his superiors, and that he must leave his rights to freedom of speech outside the classroom door. This Court has never sanctioned such an attitude in this sensitive area, quite the contrary.

In responding to the due process branch of this case, respondents raise the spurious argument that disputes such as are raised in this cause are not amenable to solution through the processes of notice and hearing. This is tantamount to admitting that they would be unable to support and justify their decision to an impartial arbiter were petitioner given an opportunity to respond, and thus have both sides of the question heard. The assertion that the charges levelled at petitioner were professional rather than personal is a specious one. The only charge that could be placed into the category of a professional criticism was that he overemphasized sex in his health survey course. The charges that petitioner counselled an excessive number of students, and did so with his office door closed, and that he belittled other staff members are personal charges, not professional disagreements concerning his method of teaching. These are all matters which are either true, or not true. They are not issues which call for value judgments, but rather for a search for the truth.

Respondents' further argument that there is an absence of prima facie proof of damage to petitioner's reputation,

and a foreclosure of other employment opportunities is similarly not supported by the record. Defendant Geigle admitted, on the witness stand, that it is drastic and unusual to relieve a teacher of classes at the beginning of a new semester, in mid-year. (Tr. 700) Defendant Skok testified that the decision was made that the administration of the Department in which petitioner was employed had reached the conclusion that they could not permit plaintiff to continue having contact with students. (Tr. 746-47) Such highly unusual actions are in themselves so obviously damaging to a teacher's reputation, both personal and professional, as to require no further "proof" of damage.

Finally, contrary to the assertions of Respondents, the due process issue is squarely presented by this cause. The instructions of the trial court to the jury on this issue left it to the jury to determine the kind of hearing to which petitioner was entitled. The jury was directed that in order to find for petitioner, it must conclude that plaintiff had proved that "he was entitled, as a right under the Constitution, to more opportunity to give his side than, in fact, he was afforded. That is, that he was not given an opportunity to learn what the charges were, or an opportunity to refute them, which was reasonable under all of the circumstances." (Tr. 1033) This is tantamount to no instruction at all, for a jury cannot be left to its own devices in determining what is required by the Constitution. This is clearly a judicial function.

CONCLUSION.

The decision of the courts below in this matter represent a retreat from the principles laid down by this Court in the rights afforded teachers. The effect of these decisions is that a teacher has no First Amendment rights once he steps into the classroom, and that whether he is to be afforded a hearing on charges which obviously damage his personal and professional reputation is to be left to the unfettered discretion of the jury, rather than defined by the law. Such a dangerous precedent cannot be allowed to stand.

Wherefore, petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed.

Respectfully submitted,

ELMER GERTZ and
WAYNE B. GIAMPIETRO
120 S. LaSalle Street
Suite 1805
Chicago, Illinois 60603

Attorneys for Petitioner